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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 21–22) is reported at 387 F. 2d 117. The memorandum order of the district court (App. 19–20) is not reported.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on December 5, 1967. The petition for a writ of certiorari was granted on November 18, 1968 (App. 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion to vacate sentence, alleging that retained counsel wrongfully failed to perfect an appeal, was properly denied without a hearing.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California (now the Eastern District) in which he was represented by retained counsel, petitioner was convicted on eleven counts of an indictment charging concealment and sale of heroin in violation of 21 U.S.C. 174. On June 20, 1963, he was sentenced to imprisonment for twenty years on each count, the terms to run concurrently.

On or about August 7, 1963, petitioner filed with the district court a notice of appeal (App. 2) and an application to proceed in forma pauperis. In the former document, petitioner alleged that he had given oral notice of appeal, and that the document constituted a "formal notice of appeal" (App. 2–3). On August 22, 1963, the district court, accepting petitioner's allegations as true, denied the application on the ground that no written notice of appeal had been filed within ten days of judgment as required by Rule 37(a)(1),[1] F. R. Crim. P. (App. 4–5). On October 31, 1963, petitioner applied to the court of appeals for an extension of time within which to apply for leave to appeal in forma pauperis or, alternatively, for a writ of habeas corpus (App. 7–10). In that applica-

[1] Now Rule 4(b), Federal Rules of Appellate Procedure.

tion, petitioner alleged, *inter alia*, that prior to sentencing he had informed his retained counsel that he desired to appeal; that oral notice of appeal had been given to the trial court at the time of sentencing; and that, without his knowledge, his attorney had terminated his representation upon conclusion of the proceedings in the trial court and had not filed a written notice of appeal as requested (App. 8–10). On the authority of *United States* v, *Robinson*, 361 U.S. 220, the court of appeals denied the application for an extension of the time in which to file a notice of appeal; and it also denied the application for a writ of habeas corpus (App. 11).

On February 15, 1966, petitioner moved to vacate his sentence under the provisions of 28 U.S.C. 2255. In that motion petitioner alleged as the sole ground for relief that "I was 'defrauded' of my 'known right' to appeal by retained trial counsel, Paul J. Melee" (App. 14). In support of that allegation, petitioner set forth the following (App. 15):

> In the case at bar, the record will reflect that petitioner gave oral notice of appeal. Thereafter, petitioner's retained trial counsel failed to file a written notice of appeal in compliance with Rule 37(a)(1), Federal Rules of Criminal Procedure, thereby "defrauding" petitioner of his "known right" to appeal. *Calland* v. *United States*, 323 F. 2d 405.
>
> It is to be observed that petitioner is of mexican decent [sic], a citizen of the United States of America, who could not communicate in the English language (read, write or speak) at the

time judgment was imposed. Petitioner was also incarcerated, without funds or the technical knowledge with which to exercise his "known right" of appeal. Thus, when trial counsel failed to file a written notice of appeal, after oral notice had been given, with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.

Petitioner was transported to the United States Penitentiary, where he is presently confined, to commence service of his sentence, with the sincere belief that his judgment of conviction was, in fact, on appeal.

Petitioner has diligently studied the English language during these past two years of incarceration, in order that he may effectively seek judicial redress in this matter.

In denying the motion, the district court held, *inter alia* (App. 19):

Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37(a). Petitioner alleges: "Thus, when trial counsel failed to file a written notice of appeal . . . . with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud."

The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss

> he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or *judge the substantiality* of petitioner's claim. [Emphasis added.]

The court below affirmed on the same grounds (App. 21–22).

SUMMARY OF ARGUMENT

In the instant motion to vacate his sentence, petitioner alleged only two facts: that an oral notice of appeal had been given at trial, and that his retained counsel had failed to file a written notice of appeal. Because these allegations are as consistent with an innocent explanation as they are with petitioner's conclusory assertion that his attorney thereby "defrauded" him of his right to appeal, the motion was properly denied without a hearing—particularly in light of the fact that petitioner's motion also failed to specify any arguable error at trial. The additional factual allegations contained in the petition for a writ of certiorari do not indicate that the courts below erred on the record before them, but merely demonstrate that petitioner may, if he desires, file a new motion, under oath, in the district court alleging facts sufficient to require further proceedings.

This Court need not specify that a hearing would invariably be required even when such a motion adequately alleges that the prisoner was defrauded of his

right to appeal because of counsel's professional misconduct. In some cases, the district court may seek a response from the attorney or other officers, and may properly deny the motion on the basis of the attorney's affidavit offering a convincing reason for his action, or on the basis of a showing by documentary evidence that the allegations are untrue.

ARGUMENT

The basic question in this case is how much of a showing must be made to require a hearing by the district court on a prisoner's claim that his own counsel—in this case, retained—wrongfully deprived him of his right to appeal. Petitioner, at the district court level, alleged only two facts: that an oral notice of appeal had been given at trial, and that counsel failed to file a written notice of appeal. On the basis of these two facts, petitioner argued that he was "defrauded" of his known right of appeal. The facts alleged, however, do not add up to the conclusion suggested by petitioner—*i.e.*, fraud on the part of retained counsel. There might well have been other reasons for the failure, including petitioner's own later decision not to appeal.

In the petition for a writ of certiorari filed in this Court, petitioner gave a different, much more detailed, version of events. He there alleged that he requested an interpreter to advise the court that he wanted to appeal; that he instructed his attorney to appeal; that he never saw or heard from his attorney after the date of sentencing; and that on that

day his attorney promised petitioner and his co-defendant wife that he would arrange for their appeals so that petitioner, when he left for the penitentiary, believed that the attorney was making the necessary arrangements for appeal (Pet. 4–5). None of these allegations was, however, before the district court on the motion to vacate. None of them is supported by an oath so that, if the allegation is proven deliberately false, petitioner would be subject to the penalties for perjury.[2] Thus petitioner is asking this Court to reverse the courts below on the basis of a very different record from that which was before the district court (see Pet. Br. 8, 10).

This case illustrates the practical problems which confront district courts in dealing with prisoners' motion under 28 U.S.C. 2255. Except for the question of whether it is necessary to show some basis on which an appeal would lie (see *infra*, pp. 10–11), there is substantial agreement in the decisions as to when a prisoner can be said to have been deprived of his right to appeal so that, when the issue is raised at a later date, a prisoner can be given what is in effect a late appeal.[3] Such relief is granted in two

[2] Rule 28(1) of the Rules of Practice, United States District Court, Northern District of California, specifically provides that a motion to vacate must be verified by the movant prior to filing.

[3] There is some variation in the method of accomplishing this result. In the Fifth Circuit, if a prisoner establishes that he had been defrauded of his right to appeal, he is entitled to use the Section 2255 remedy for direct review in both the district court and the court of appeals. *[illegible] v. United States*, 346 F. 2d 789, 792 (C.A. 5); *Camp* v. *U[illegible]tates*, 352 F. 2d 800 (C.A. 5).

general types of situations: (1) where counsel abandoned his client's cause and failed to advise him of his right to take an appeal and the steps necessary to perfect that right, *Williams* v. *United States*, 402 F. 2d 548 (C.A. 8); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.); see *Boruff* v. *United States*, 310 F. 2d 918 (C.A. 5); *United States* v. *Smith*, 387 F. 2d 268 (C.A. 6); *Hannigan* v. *United States*, 341 F. 2d 587 (C.A. 10);[4] or (2) where counsel *fraudulently* failed to perfect an appeal on the defendant's behalf, *Desmond* v. *United States*, 333 F. 2d 378 (C.A. 1); *Camp* v. *United States*, 352 F. 2d 800 (C.A. 5); see *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7). On the other hand, it is well established that the need for an orderly administration of criminal justice precludes a later appeal where a timely notice of appeal had not been filed because of mere *neglect* on the part of counsel. *United States* v. *Robinson*, 361 U.S. 220; *Bern[illegible]* v. *United States*, 378 U.S. 530. And, as suggested by petitioner, a knowing

In the Eighth and District of Columbia Circuits, upon a proper showing, judgment will be vacated and the prisoner will be resentenced and allowed ten days in which to file a written notice of appeal. *Williams* v. *United States*, 402 F. 2d 548, 552 (C.A. 8); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.).

[4] The situation where a defendant in a federal court has not been advised of his right to appeal should arise very rarely in the future. Under Rule 32(a)(2), F.R. Crim. P., the trial court, at the time of sentencing, is required to advise each defendant of his right to appeal, and of his right to proceed in forma pauperis if he is unable to pay the costs. If the defendant so requests, Rule 32(a)(2) requires the clerk of the court to prepare and file a timely notice of appeal on the defendant's behalf.

decision by a defendant not to take an appeal precludes a change of heart at a later date. The difficulty is not in the principles to be applied, but in the manner of applying them to the various petitions filed by prisoners, sometimes long after the events in question.

Petitioner's counsel suggests (Br. 16) that the issue, such as petitioner raises, can easily be resolved by a hearing at which petitioner and his former counsel would testify. This is a deceptively simple solution. To use it, the defendant must be brought before the district court from Washington, accompanied by guards since he is a prisoner with a long sentence. Moreover, a respected member of the bar must, in effect, face a public hearing on a charge that he has been guilty of fraud and deceit in the discharge of his duties—conduct which could subject the attorney to subsequent suspension or disbarment. See, *e.g.*, *People* v. *Brown*, 39 Ill. 2d 307, 235 N.E. 2d 562. The time of an already overburdened court must be taken up with a hearing on allegations which, in many cases, turn out to be wholly contrived.[5] For these reasons, a hearing should not be required on the basis of unspecific and inconclusive allegations such as this petitioner

[5] In 1961, only 3 percent of all Section 2255 applications were granted by district courts. *Machibroda* v. *United States*, 368 U.S. 487, 497, n. 2 (dissenting opinion). The number of such applications filed each year has approximately doubled since then, while the number of all requests for collateral relief has climbed to a record high of 10,989. Administrative Office of the United States Courts, Annual Report of the Director, 1968, pp. II–43—II–44.

made in the district court. Some consideration is due the attorney and the court, as well as the prisoner.

The necessity to confine hearings to cases which potentially can bear some meaningful results has, we believe, led the court below to adopt the rule of decision applied in this case. That rule is that a defendant who claims that counsel has deprived him of his right of appeal must specify the alleged error at trial. *Miller* v. *United States*, 339 F. 2d 581 (C.A. 9); *Wilson* v. *United States*, 338 F. 2d 54 (C.A. 9).* The reason underlying this requirement is apparently the following. Even if a defendant could prove that he was deprived of his right to appeal, he would not be entitled to have his sentence vacated. The relief to which he would be entitled would be to have his case considered as if on direct appeal. See n. 3, *supra*. Accordingly, if there is no issue which would arguably result in vacation of the judgment on direct appeal, there is no reason to go into the question of whether an appeal should have been noted. Moreover, a showing of arguable error would tend to bolster a claim that counsel had been derelict in failing to take an appeal.

We recognize, however, that such a requirement does present a danger that a motion under 28 U.S.C. 2255 will not always reach the situation in which a collateral remedy is most appropriate—the rare situation of an ignorant defendant who has been caught in the coils of judicial machinery gone awry. The

* The court of appeals also cited *McGarry* v. *Fogliani*, 370 F. 2d 42 (C.A. 9), which follows *Wilson* and *Miller*.

more inarticulate and ignorant the defendant, the less likely it is that he would be able to describe, or even to ascertain the existence of, any error at his trial. In most cases it is probable, as we suggested in opposing the petition for certiorari in this case, that prisoners could, in layman's language, make some statement of the nature of the claimed error. We do not urge, however, that this be an absolute prerequisite to a district court's determination that some investigation should be made of a defendant's claim that he has been fraudulently deprived of his right to appeal.[7]

[7] Several courts of appeals have held that where the defendant claims that he was not advised of his right to appeal, or where the defendant claims that counsel deliberately and fraudulently failed to perfect an appeal, the defendant is entitled to a hearing under the provisions of 28 U.S.C. 2255, notwithstanding the fact that the motion papers fail to allege the nature of the error which occurred at trial. See *Camp* v. *United States*, 352 F. 2d 800 (C.A. 5); *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.).

On the other hand, the courts of appeals for the First and Tenth Circuits, as well as the court below, have ruled that there must be some indication as to the nature of the errors which allegedly occurred at trial prior to a hearing on the motion under the provisions of 28 U.S.C. 2255. In *Desmond* v. *United States*, 333 F. 2d 378, 381 (C.A. 1), the court analogized the situation to one where a defendant applies for leave to appeal in forma pauperis under the provisions of 28 U.S.C. 1915. In holding that the government should be permitted to point out the futility or frivolity of an appeal—as it would be able to do in opposition to a motion for leave to appeal in forma pauperis—before a hearing on the motion should be granted, the court implicitly required some assertion of the nature of the alleged errors at trial, since the government would not otherwise be able to make a responsive claim of futility

What we do urge is that, particularly where he has failed to make any showing of an arguable point on appeal, a defendant who, like this petitioner, claims that he was fraudulently deprived of his right to appeal, should be held to the duty to make specific and detailed allegations of the facts giving rise to that complaint. He should not be allowed to rest on a generalized charge of fraud supported, as was petitioner's application to the district court, only by factual allegations which are as consistent with an innocent explanation as with fraud. This is a general requirement with respect to motions under 28 U.S.C. 2255. See, *e.g.*, *Martinez* v. *United States*, 344 F. 2d 325 (C.A. 10); *United States* v. *Orlando*, 327 F. 2d 185, 188–189 (C.A. 6); *Rivera* v. *United States*, 318 F. 2d 606, 608 (C.A. 9); *Davis* v. *United States*, 311 F. 2d 495 (C.A. 7). It would seem to be especially applicable where a defendant is accusing his own counsel of breach of professional duty. Adherence to such a requirement would aid in narrowing and framing the disputed factual issues to determine whether they ought to be resolved at a subsequent hearing. It would also be a safeguard against abuse since, if the movant must allege specific facts, he may be aware that his specific allegations may be shown to be deliberately false and that he himself may be subject to prosecution for perjury. The kind of allegations to which this

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or frivolity. And in the Tenth Circuit the court has said that an allegation that counsel failed to advise his client of his right to appeal is not enough, that there must be an additional allegation of "plain error" at trial. *Hannigan* v. *United States*, 341 F. 2d 587, 588 (C.A. 10).

argument is directed can be made by any prisoner who has a just complaint. He knows whether he did or did not arrange (or seemingly arrange) with an attorney to take an appeal and whether the attorney did or did not tell him (or seemingly tell him) that he would do so. This very case illustrates our contention in this respect. In this Court, in his petition for a writ of certiorari before counsel was appointed, petitioner did make the kind of specific allegations which, if made to the district court, would require further inquiry by the court. He did not make them under oath to the district court. His allegations there were too generalized and inconclusive to require further action. His allegations in this Court, if made under oath, would in our view require some further consideration of his claim.

It might be enough to rest the matter there and suggest that, if petitioner is willing to make his present allegations under oath, the district court should hold a hearing on his claim. Considering the growing problem which motions under 28 U.S.C. 2255 present, however, we do not so suggest. Since the issue is before the Court at this time, we believe that it is appropriate to consider whether, when such a motion does allege facts sufficient to require further consideration, the district court must invariably order a hearing, or whether any alternative procedures are open to it. At least in the situation which this case presents, where a convicted prisoner claims that his own attorney has been guilty of a breach of professional

duty, we believe that it would be appropriate for a district court to consider an affidavit by the attorney involved before deciding whether a hearing is needed. The attorney may have a very simple explanation of the facts which the defendant alleges; he may have documentary evidence which refutes the allegations made. This Court in *Machibroda* v. *United States*, 368 U.S. 487, 495, noted that the language of 28 U.S.C. 2255 "does not strip the district courts of all discretion to exercise their common sense." It seems to us "common sense" to allow an attorney the courtesy of refuting a prisoner's charges against him by affidavit before requiring the attorney to go through a hearing in which he is in effect the accused. If his affidavit is convincing as to the reasons for his action, or if the attorney can show by documentary evidence that the allegations are untrue, the district court may properly conclude that there is no need for a hearing. If the affidavit leaves the issue in doubt, the court may appoint an attorney for the prisoner, and have the former attorney testify subject to cross-examination without the necessity of producing the prisoner. *Sanders* v. *United States*, 373 U.S. 1, 20–21; *Machibroda*, *supra*, 368 U.S. at 495–496. On the other hand, there may be situations in which the presence of the prisoner is deemed essential or advisable.

In short, we see no reason why the courts should not be allowed to give due weight to the sworn affidavit of a member of the bar. Motions for a new

trial on grounds of newly discovered evidence may be determined on affidavits (*United States* v. *Johnson*, 327 U.S. 106) although courts frequently do order hearings where conflicting allegations cannot be resolved without hearing the witnesses. At least in the situation where a prisoner is accusing his own attorney, we think the same measure of discretion should be accorded to the district courts on motions under 28 U.S.C. 2255. This Court's opinions in *Machibroda* and in *Walker* v. *Johnston*, 312 U.S. 275, 287, should not, in our view, be read as precluding a district court from giving due weight to affidavits. On the records in those cases, this Court held that hearings were required. We respectfully suggest, however, that, in the situation at issue here, the sworn affidavit of a member of the bar is entitled to consideration, along with the prisoner's allegations, in a district court's determination of whether a hearing should be held.

CONCLUSION

For the reasons stated we respectfully submit that the judgment of the court below should be affirmed on the basis of this record, without prejudice to petitioner's right to have the matter considered further if he makes, under oath, specific allegations of fact to the effect that his attorney agreed to appeal his case

and led him to believe that the attorney was taking the steps necessary to do so.

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